Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

LUHR BROS., INC.,
Petitioner,

v.

ROBERT HANKS,
Respondent.

On Petition for Writ of Certiorari to the
Illinois Appellate Court for the Fifth District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Jones Act, 46 U.S.C. app. § 688(a) (1994), provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply...." The questions presented in this case are:

1. Whether Congress intended the defendant in a Jones Act negligence case to have no right to a jury trial and the plaintiff seaman to have the exclusive right to determine whether the case will be heard by a jury.

2. Whether the right to have the case tried to a jury, which this Court has held is part and parcel of the substantive remedy afforded litigants under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* (1994), is extended to Jones Act defendants by the incorporation of the FELA into the Jones Act and § 53 of the FELA, which specifically provides that issues of contributory negligence shall be determined by a jury.

3. Whether a state court's interpretation of the Jones Act so as to find that the defendant in a Jones Act negligence case has no right to trial by jury and only the plaintiff seaman can elect to have the case heard by a jury violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

RULE 29.6 LISTING

Petitioner has no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States.

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1. The text of the Jones Act and the decisions of this Court and the United States Courts of Appeals construing the Jones Act demonstrate that, contrary to the holding of the Illinois Appellate Court, Congress did not intend to deny a Jones Act defendant the right to a jury trial or to confer that right exclusively to the plaintiff seaman.	6-7

2. The Illinois Appellate Court's holding that the FELA, as incorporated into the Jones Act, confers no right in a defendant to demand a jury trial in a Jones Act negligence case is contrary in principle to a decision of this Court and the United States Courts of Appeals. 10

3. The Illinois Appellate Court's holding that the striking of a Jones Act defendant's jury demand by a state court does not constitute state action and, therefore, does not violate the Equal Protection Clause of the Fourteenth Amendment is in conflict with decisions of this Court. 12

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OPINIONS BELOW

The opinion of the Appellate Court of Illinois for the Fifth District is reported at 303 Ill. App. 3d 661, 707 N.E.2d 1266, 236 Ill. Dec. 696. Appendix D, *infra*. The Illinois Supreme Court's denial of Petitioner's Petition for Leave to Appeal is reported at 184 Ill. 2d 556.

JURISDICTION

The opinion of the Appellate Court of Illinois for the Fifth District was entered on March 9, 1999. Appendix D, *infra*. On June 2, 1999, the Supreme Court of Illinois denied a Petition for Leave to Appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal questions raised in this Petition involve the Jones Act, 46 U.S.C. app. § 688(a), the FELA, 45 U.S.C. § Stet., and Section 1 of the Fourteenth Amendment to the United States Constitution, which are set forth in full in Appendices E-G, *infra*.

STATEMENT OF THE CASE

Respondent Robert Hanks worked as a deckhand employed by Petitioner Luhr Bros., Inc. ("Luhr"). He claimed he slipped and fell on the deck of a vessel. Despite a preexisting low back condition with chronic back pain, and the longstanding receipt of benefits from the military for his service related back injury, Respondent claimed that he was disabled by the fall. Respondent filed suit against Luhr under the Jones Act and General Maritime Law in the Circuit Court of St. Clair County, Illinois, and did not make a demand for trial by jury. Luhr did make a demand for trial by jury. On Respondent's Motion, the trial court struck Luhr's timely demand for trial by jury and subsequently denied Luhr's Motion for Trial by Jury. App. *infra*., A-1 and A-2.

At the non-jury trial, the Respondent presented his medical proof, which included the testimony of his operating orthopedic surgeon. However, the surgeon acknowledged that the lower back abnormality and pain of which the Respondent complained preexisted. After treatment by the surgeon, Respondent was released to medium duty work and was pursuing an education to become an electrician, a job in which he could be expected to earn virtually the same amount of money post-injury as pre-injury. Despite these facts, the Respondent received a non-jury verdict of $901,091.32, which included $390,000 for loss of earnings. App., *infra.*, A-5 The opinion of the Illinois Appellate Court demonstrates that Luhr challenged the allegations of negligence and damages at trial. It contended on appeal that those issues should have been decided by a jury and that the Judge's findings were erroneous and the damages were excessive.

Luhr appealed to the Illinois Appellate Court for the Fifth District, arguing that it was entitled to a jury trial, and raising other issues. The Appellate Court reviewed de novo the trial court's order striking Luhr's jury demand, as it involved the review of federal statutory and constitutional law, and affirmed the trial court.

The Illinois Appellate Court held that federal law controls the right to a jury trial in a Jones Act case. *Hanks v. Luhr Bros., Inc.*, 303 Ill. App. 661, 667, 707 N. E. 2d 1266, 1271, 236 Ill. Dec. 696, 701 (Ill. App. Ct. 1999). It then looked to the Jones Act to determine whether Luhr was entitled to a jury. In construing the Jones Act, the Appellate Court held: "when Congress passed the Jones Act, it made trial by jury a matter for the seaman to decide. Congress wanted the seaman's employer to abide by that decision." *Id.* at 663, 707 N.E.2d at 1268, 236 Ill. Dec. at 698 (citation omitted). Thus, the Appellate Court held that Luhr had no right to a jury trial because the plaintiff seaman has the exclusive right to decide whether the case will be submitted to a

jury or the court. *Id.* at 668, 707 N.E.2d at 1271, 236 Ill. Dec. at 701

The Appellate Court further found that the FELA, as incorporated into the Jones Act, confers no right upon a defendant to demand a jury trial in a Jones Act case. *Id.* at 666, 707 N.E.2d at 1270, 236 Ill. Dec. at 700. Again, the Appellate Court's decision rested upon its interpretation of the Jones Act, as it held that any such construction of the FELA "'would contravene the plaintiff's expressly articulated right to elect a jury trial or nonjury trial'" in Jones Act cases. *Id.* (quoting *Gibbs v. Lewis & Clark Marine, Inc.*, 298 Ill. App. 3d 743, 750, 700 N.E.2d 227, 232, Ill. Dec. 126, 131 (Ill. App. 1998)).

The Appellate Court concluded finally that Luhr's equal protection rights under the Fourteenth Amendment were not violated because the trial court's striking of Luhr's jury demand did not constitute state action. The Appellate Court relied once again upon its construction of the Jones Act, holding that:

> Since the trial judge merely executed a congressional intent to allow plaintiff the exclusive right to elect a trial by jury and the judge struck a jury demand that Congress did not contemplate, the true source of the alleged disparate treatment was the federal statute itself. Congress conferred on plaintiff the exclusive right to trial by jury, and Congress was not obliged to abide by fourteenth amendment constraints when it did so.

Hanks, 303 Ill. App. 3d at 667-668, 707 N.E.2d at 1271, 236 Ill.

Dec. at 701.[1] Accordingly, the Illinois Appellate Court held that there was no violation of the Fourteenth Amendment as there was no state action necessary to precipitate its guarantees. *Id.*

HOW THE FEDERAL QUESTION WAS PRESENTED

The opinion of the Illinois Appellate Court traces the history of how the federal questions at issue were raised in the court below. *Hanks*, 303 Ill. App. 3d at 665, 707 N.E.2d at 1269, 236 Ill. Dec. at 699.

Luhr first asserted its right to trial by jury in response to the trial court striking its jury demand. On September 18, 1997, Luhr filed its Motion for Trial by Jury and Memorandum in Support in which Luhr argued that the Jones Act does not deny it the right to demand a jury trial. (C. 287-310)[2] Luhr further argued that it was entitled to a jury trial under the FELA and that the striking of its jury demand violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (C. 287-310) The trial court denied Luhr's Motion for Trial by Jury on December 16, 1997. App., *infra.*, A-2.

After the trial court entered judgment in favor of Respondent, Luhr filed its Notice of Appeal and asserted that it was entitled to a jury trial under the Jones Act and the FELA and that the denial of a jury trial violated the guarantee of equal protection

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[1] The Illinois Appellate Court also held that Luhr had no right to a jury trial under the Illinois Constitution. Luhr asserted in the court below that the Illinois Constitution guaranteed the right to a jury trial in this case. The Illinois Appellate Court's finding that a Jones Act defendant has no right to a jury trial under the Illinois Constitution does not constitute independent state law grounds for its decision as the Illinois Appellate Court expressly held that the right to a jury trial is controlled by federal law, namely the Jones Act. *Hanks*, at 667, 707 N.E.2d at 1271, 236 Ill. Dec. at 701. Thus, the Illinois Appellate Court's holding as to Luhr's right to a jury trial under Illinois state law was merely dicta.

[2] Citations to (C._____) are citations to the Court record below.

under the Fourteenth Amendment. (C. 755-58) Luhr also raised these issues in its briefs filed before the Illinois Appellate Court for the Fifth District. The Appellate Court expressly rejected Luhr's arguments in its opinion.

Luhr filed a Petition for Leave to Appeal to the Illinois Supreme Court raising the same arguments with respect to the jury issue that were before the Illinois Appellate Court. The Illinois Supreme Court denied Luhr's Petition for Leave to Appeal.

REASONS FOR GRANTING THE PETITION

THE HOLDING OF THE ILLINOIS APPELLATE COURT CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE UNITED STATES COURTS OF APPEALS AND IS CONTRARY TO FEDERAL STATUTORY LAW. THE CASE ALSO INVOLVES AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The uniformity of federal admiralty and maritime law has been a special concern of this Court from the earliest days of the Republic. *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443, 453-54 (1852). This concern arises, ultimately, from the Constitution's extension of federal judicial power "to all Cases of admiralty and maritime jurisdiction." U.S. Const. art. III, § 2. Indeed, this Court in the last decade has demonstrated this solicitude in its pronouncements on Jones Act seaman's status. *See, e.g., McDermott Int'l, Inc. v. Willander*, 498 U.S. 337 (1991); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *Harbor Tug & Barge Co.*, 520 U.S. 548 (1997); *See also, Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (recognizing "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country'").

The instant case presents a nascent and fundamental threat to that uniformity. In Illinois, Jones Act plaintiffs' attorneys have begun filing Jones Act complaints without jury demands, and successfully striking the employers' demand for trial by jury. Historically, in Jones Act cases in common law state courts, defendants have received jury trials. The first reported incident in Illinois of a defendant in a Jones Act case being denied a jury trial is *Allen v. Norman Bros., Inc.*, 286 Ill. App. 3d 1091, 678 N.E.2d 317, 222 Ill. Dec. 705 (Ill. App. 1997). The striking of a defendant's jury demand results in a bench trial before elected judges who run for office as candidates of political parties. This instant case is just one in a line of reported cases in Illinois in which modest claims have led to disproportionately large verdicts in such bench tried cases. This is contrary to a proper interpretation of federal law and contrary to accepted trial practice in the several states.

Not only is admiralty and maritime law uniformity at stake, but the right to trial by jury in a civil case is also presented here. This Court has recognized its historical role in safeguarding this important right: "Special and important reasons for the grant of certiorari . . . are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 510 (1957). The decision of the Illinois Appellate Court below is a misinterpretation of the Jones Act and Federal Employers' Liability Act and is a violation of the Equal Protection Clause of the Fourteenth Amendment. For these reasons, as set forth more fully below, the Court should grant certiorari to examine and correct the tear in the uniform fabric of the federal maritime law represented by the decision of the Illinois Appellate Court.

1. **The text of the Jones Act and the decisions of this Court and the United States Courts of Appeals construing the Jones Act demonstrate that, con-**

trary to the holding of the Illinois Appellate Court, Congress did not intend to deny a Jones Act defendant the right to a jury trial or to confer that right exclusively to the plaintiff seaman.

The Illinois Appellate Court's holding that a Jones Act defendant has no right to a jury trial is without foundation in the text of the Jones Act, has no support in the legislative history of the Act and is contrary to interpretations of the statute by this Court and the Federal Circuit Courts. In its opinion, the Illinois Appellate Court proclaims that "[w]hen Congress passed the Jones Act, it made trial by jury a matter for the seaman to decide. Congress wanted the seaman's employer to abide by that decision." *Hanks v. Luhr Bros., Inc.*, 303 Ill. App. 3d 661, 663, 707 N.E. 2d 1266, 1268, 236 Ill. Dec. 696, 698 (Ill. App. Ct. 1999). The Jones Act, however, simply states that a "seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury...." 46 U.S.C. § app. 688(a). Significantly, it does not state that a defendant has no right to a jury trial in a negligence action filed under the Jones Act. Nor does it state that a seaman may, at his exclusive election, determine whether an action for damages filed at law will be tried to a jury or the court. Hence, to hold, as the Illinois Appellate Court did, that Congress intended the Jones Act to grant only the plaintiff the right to a jury trial is without legislative support whatsoever. [3]

The Illinois Appellate Court's interpretation of the Jones Act also conflicts in principle with the construction of the Act by this Court and the United States Courts of Appeals. As this Court

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[3] The legislative history of the Jones Act is also devoid of any suggestion that Congress intended only Jones Act plaintiffs to have the right to a jury trial. It is unfathomable that Congress would create a cause of action in which one party is denied the right to a jury trial without debate or discussion of this point.

held in its first Jones Act case, *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924), the true import of the phrase "may maintain" an action at law "with the right of trial by jury" means "that the injured seaman is permitted, but not required, to proceed on the common-law side of the court *with a trial by jury as an incident.*" *Id.* at 390-91 (emphasis added). Applying that precedent, Judge Learned Hand succinctly described the election given plaintiffs under the Jones Act as being "between a trial by jury and a suit in admiralty." *Balado v. Lykes Bros. S.S. Co., Inc.*, 179 F.2d 943, 945 (2d Cir. 1950). Thus, the Jones Act allows the seaman to elect to proceed at law and, if he so elects, the right to a jury trial flows as an incident to that election. The Jones Act does not allow the seaman a two-step election, *i.e.* first to elect to file his claim at law and second to elect a non-jury trial, forcing the defendant to accept that second election.[4]

Furthermore, the Illinois Appellate Court's decision cannot be reconciled with the Third Circuit's opinion in *Yates v. Dann*, 223 F.2d 64 (3d Cir. 1955). In *Yates*, the plaintiff brought his Jones Act claim on the civil side of the federal court and demanded a jury trial. *Id.* at 66. The jury returned a verdict in favor of the plaintiff, but failed to follow the court's instruction as to awarding damages. *Id.* The court awarded a new trial limited to the issues of damages and the plaintiff moved to transfer the suit to admiralty so that the court, not a jury, would decide the remainder of the case. *Id.* Plaintiff's motion was granted over the defendants' objection that such a transfer would deprive them of their right to a jury trial. *Id.*

On appeal, the Third Circuit reversed, finding that the defendants were denied their right to a jury trial on the issues of damages and comparative negligence. *Id.* at 66. The Third

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[4] Respondent's action in this case was necessarily filed "at law," rather than in admiralty, as it was filed in the state court pursuant to the saving to suitors clause, 28 U.S.C. §1333 (1994).

Circuit found that, under Rule 38(d) of the Federal Rules of Civil Procedure, the plaintiff could not transfer the case to admiralty and thus, withdraw his jury demand without the consent of the defendant. The Court stated that "[t]here is nothing in the Jones Act . . . which alters the application of this fundamental guarantee." *Id.* Thus, the Third Circuit concluded that under the Jones Act, the plaintiff does not have the power to unilaterally elect a non-jury trial except by recourse to Rule 9(h) of the Federal Rules of Civil Procedure and the election to proceed in admiralty must occur before trial. *Id.* at 64.[5] The Illinois Appellate Court's decision is in direct conflict with *Yates* as the Illinois Court expressly held that, in enacting the Jones Act, Congress "made trial by jury a matter for the seaman to decide" in cases filed at law in state court and "the seaman's employer [must] abide by that decision." *Hanks*, 303 Ill. App. 3d at 663, 707 N.E.2d at 1268, 236 Ill. Dec. at 698.

The *Yates* decision is consistent with this Court's opinion in *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). In *Fitzgerald*, this Court held that a seaman who alleged claims for maintenance and cure and negligence under the Jones Act arising out of the same facts was entitled to a jury trial on both claims. 374 U.S. at 21. In reaching its decision, this Court held that no "statute of Congress or Rule of Procedure, Civil or Admiralty, forbid[s] jury trials in maritime cases." *Id.* at 20. This Court further held that "Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury. . . .

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[5] The decisions of the Fifth Circuit Court of Appeals in *Rachal v. Ingram Corp.*, 795 F.2d 1210, (5th Cir. 1986) and the Ninth Circuit Court of Appeals in *Craig v. Atlantic Richfield Co.*, 19 F.3d 472 (9th Cir. 1994) are in conflict with the foregoing thrust of the *Yates* decision. It is submitted that the courts in *Rachal* and *Craig* misconstrued the election given to the plaintiff under the Jones Act and these decisions are in conflict with this Court's decision in *Panama R.R. Co. v. Johnson* , 352 U.S. 500 (1957), and the principles enunciated in *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963).

Therefore, the jury, a time-honored institution in our jurisprudence, is the only tribunal competent under the present congressional enactment to try all the claims." *Id.* at 21. Thus, this Court has held that the Jones Act does not prohibit jury trials, but instead expressly provides for trial by jury. The Illinois Appellate Court's decision conflicts with this principle enunciated in *Fitzgerald.*

2. The Illinois Appellate Court's holding that the FELA, as incorporated into the Jones Act, confers no right to a defendant to demand a jury trial in a Jones Act negligence case is contrary in principle to a decision of this Court and the United States Courts of Appeals.

The Illinois Appellate Court, in reaching its decision denying Luhr the right to a jury trial, also misinterpreted the FELA. It held, erroneously, that § 53 of the FELA, which explicitly affords defendants the right to jury trial on comparative fault issues, and which is expressly incorporated into the Jones Act, is overridden by the plaintiff's non-jury election. This is contrary to case law interpreting § 53 of the FELA.

The Jones Act and the FELA are to be read and applied in tandem. The applicable provision of the Jones Act, 46 U.S.C. app. § 688(a), makes "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees" applicable to claims filed pursuant to the Act by seamen. Thus, FELA provisions apply in Jones Act cases.

When Congress imported the FELA into the Jones Act, it brought with the FELA the preference for jury trials in what are essentially negligence cases. In *Schulz v. The Pennsylvania R.R. Co.*, 350 U.S. 523 (1956), this Court held: "The jury trial 'is part and parcel of the remedy afforded railroad workers under the

Employers' Liability Act,' which the Jones Act makes applicable to those working [as crewmen of the tug]." *Id.* at 524 (quoting *Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350, 354 (1943)). The *Schulz* case involved a crewman of a tug. The railroad was a Jones Act employer.

The Court in *Schulz* granted certiorari to review the trial court's granting of a directed verdict motion. The clear inference of the court's opinion is that as part and parcel of the remedy provided in FELA and Jones Act cases, the defendant, as well as the plaintiff, is necessarily given a right to trial by jury.

The *Schulz* decision also establishes that the role of the jury is an essential part of the trial of Jones Act and FELA cases, in stating that:

> Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. '[We] think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.'

Schulz, 350 U.S. at 525-26 (quoting *Jones v. East Tennessee, v. & G. R. Co.*, 128 U.S. 443, 445 (1888)). This is no more than a statement of a fundamental principle of this country's system of jurisprudence.

In *Fitzgerald*, this Court characterized the jury as "a time-honored institution in our jurisprudence" in concluding that "Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury." *Fitzgerald*, 374 U.S. at 21.

If the trial by jury is fundamental in deciding negligence issues from the standpoint of the plaintiff, how can it be said to be less fundamental for the defendant? Clearly it is not.

Section 53 of the FELA, 45 U.S.C. § 53, in fact, states that:

> In all actions . . . to recover damages for personal injuries to an employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished *by the jury* in proportion to the amount of negligence attributable to such employee . . . . (emphasis added).

In holding that 45 U.S.C. § 53 is not applicable to Jones Act defendants because it would contravene the plaintiffs' expressly articulated right to elect a jury trial or non-jury trial, the Appellate Court decision is contrary to the foregoing principle annunciated in *Schulz* and *Fitzgerald*, as well as in *Yates*, 223 F.2d at 64, a case in which § 53 of the FELA was cited as a basis for the Jones Act employer's right to trial by jury of contributory negligence issues. The Third Circuit in *Yates* reversed the trial court's judgment because it had refused to have a jury determine the diminution of damages for contributory negligence. The *Yates* decision thus concludes that 45 U.S.C. § 53 is incorporated into the Jones Act.[6]

3. The Illinois Appellate Court's holding that the striking of a Jones Act defendant's jury demand by a state court does not constitute state action and, therefore, does not violate the Equal Protection Clause of the Fourteenth Amendment is in conflict with decisions of this Court.

The Illinois Appellate Court's holding that the striking of Luhr's jury demand did not constitute state action conflicts with this Court's decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

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[6] Respondent also asserted claims under the General Maritime Law. Under this Court's holding in *Fitzgerald*, Respondent's General Maritime Law claims are to be treated as pendent to the Jones Act claim and are to be tried together to the jury as a matter of convenience.

In *Shelley*, this Court held that a state court's enforcement of restrictive covenants based on race or color constituted state action so as to invoke the Equal Protection Clause of the Fourteenth Amendment. *Shelley*, 334 U.S. at 20. In reaching its decision, this Court acknowledged that "from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials." *Id.* at 18. Moreover, this Court defined the term "state action" broadly for purposes of the Fourteenth Amendment:

> State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power *in all forms*. And when the effect of that action is to deny rights subject to protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

Id. at 20 (emphasis added). Applying this definition, it is clear that the striking of a jury demand by a state court constitutes state action within the meaning of the Fourteenth Amendment.

The decision of the Illinois Appellate Court decision impermissibly denies Jones Act defendants a right that is available to other litigants. This Court has held the denial of the right to a jury trial to a subsection of similarly situated litigants violates equal protection. In *Baxstrom v. Herold*, 383 U.S. 107 (1966), the petitioner, an inmate in a New York state prison, challenged a New York statute that allowed for his civil commitment to a state hospital following the expiration of his penal sentence without a jury trial. The petitioner argued that the statute violated his equal protection rights because New York state law allowed all persons civilly committed, other than those committed at the end of a prison term, de novo review by jury trial of the issue of their sanity. *Id.* at 109. This Court agreed, finding that "the State,

having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." *Id.* at 111.

The decision of the Illinois Appelate Court works an impermissible discrimination between railroad and Jones Act employers. The Jones Act expressly states that "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply" in Jones Act negligence actions. 46 U.S.C. § 688(a). Thus, the same substantive federal law applies to negligence actions brought under the Jones Act and the FELA. By the Illinois Appellate Court's decision, the maritime employer does not have the right to a jury while railroad employers do. As in *Baxstrom*, this arbitrary denial of the right to a jury trial to Jones Act employers when FELA employers are afforded such a right violates the Fourteenth Amendment's guarantee of equal protection.

This Court has also held that disparate treatment of litigants based solely on their status as either plaintiff or defendant violates equal protection. In *Gulf, Colorado & Santa Fe R.R. v. Ellis*, 165 U.S. 666 (1897), this Court struck down a Texas statute that allowed the plaintiff to recover his attorneys' fees from the defendant railroad because it failed to pay his claim for a colt killed on the railroad tracks. This Court held that the Texas statute violated equal protection because:

> [The railroads] do not enter the court upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not

> receive its equal protection. All this is obvious from a mere inspection of the statute.

Gulf, Colorado, 165 U.S. at 153.

This case cannot be reconciled with *Gulf, Colorado*. Luhr, as a defendant in this case, was treated differently from the plaintiff as the plaintiff had the right to demand and receive a jury trial and Luhr did not. Thus, Luhr and Respondent did not stand equal before the law and did not receive equal protection.

4. The Illinois Appellate Court's ruling involves an important question of federal law that has not been, but should be, settled by this Court.

This case involves a question of sufficient importance to warrant certiorari. This Court declared in a FELA case that: "Special and important reasons for the grant of certiorari. . . are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 510 (1957). It noted that then Rule 19 of the Supreme Court Rules (now Rule 10) authorizes a review by certiorari of state court decisions which, as here, have decided a federal question of substance in a way not in accord with, or in conflict with, applicable decisions of this Court. *Id.* 352 U.S. at 510 n. 25.

The right to trial by jury was "characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy.' (Bk. 3, p. 379). . . ." *Dimick v. Schiedt*, 293 U.S. 474, 485 (1935). As this Court proclaimed in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959), "'[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" (quoting *Dimick*, 293 U.S. at 486). In fact, in *Wilkerson v. McCarthy*, 336

U.S. 53, 55 (1949), a case in which a railroad employee appealed a directed verdict in favor of the railroad on his personal injury claim, this Court expressly granted certiorari "because of the importance of preserving for litigants in FELA cases their right to a jury trial."

Over the years, this Court has jealously guarded the plaintiff's right to a jury trial in cases filed under the Jones Act and FELA. *See Rogers v. Missouri Pac. RR. Co.*, 352 U.S. 500 (1957), *Schulz v. Pennsylvania Railroad Co.*, 350 U.S. 523 (1956) and *Bailey v. Central Vermont R. Co.*, 319 U.S. 350 (1943). This Court has not, however, addressed the issue of whether a Jones Act defendant has the right to trial by jury in a negligence case filed under the Act. There is no reasonable basis for any contention that the protection provided by recourse to the right to trial by jury is less important to a Jones Act defendant than to a Jones Act plaintiff.

CONCLUSION

This Court should grant the writ of certiorari because the decision of the Illinois Appellate Court is a serious misinterpretation of the Jones Act and Federal Employers' Liability Act, which results in denial to defendants of a trial by jury. This contravenes the fundamental underpinnings of both Acts, which envision that the jury will decide issues of negligence. If allowed to stand, the decision of the Appellate Court will serve as precedent for other state courts in hearing Jones Act cases. For these reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 96-L-117A

ROB HANKS,
Plaintiff,

vs.

LUHR BROTHERS, INC.,
Defendant.

ORDER

Upon written Motion of Plaintiff and for good cause shown, Defendant's Motion for a Trial by Jury shall be denied.

/s/ illegible
JUDGE

SO ORDERED THIS DATE: 6/3/97

APPENDIX B

STATE OF ILLINOIS
IN THE TWENTIETH JUDICIAL CIRCUIT,
ST. CLAIR COUNTY, BELLEVILLE, ILLINOIS

No. 96L 117A

Robert Hanks,
Plaintiff,

Luhr Bros., Inc.,
Defendant.

ORDER

This cause coming before the Court; the Court being fully advised in the premises, and having jurisdiction of the subject matter;

The Court finds: . . . . . .

IT IS THEREFORE ORDERED:

Based on *Allen v. Norman Bros.*, 286 Il Ap 3d 1091, defendant's motion for trial by jury is denied.

Case is set for bench trial on Jan. 26, 1998 at 9:00 a.m. in Courtroom #405.

Attorneys: Enter:

.....
Plaintiff

.....
Defendant

/s/ Robert P. LeChien
Judge

APPENDIX C

IN THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

96 L 117A

ROB HANKS,
Plaintiff

vs.

LUHR BROTHERS INC.,
Defendant.

ORDER

[Filed: March 9, 1998]

The defendant (Luhr) owned and operated the M/V MICHAEL A., a river towboat, on which the plaintiff (Hanks) worked as a deck hand. On January 31, 1996, Hanks was cleaning up hydraulic fluid that accumulated after a damaged steering ram was repaired. The ram had become damaged after the vessel fought heavy winds over a several hour period. The boat's deck was wet from water sprayed by the high winds. Hanks' job was to souge the area made sloppy by the repair work. He used detergent and a water hose to wash the grease and hydraulic fluid from the deck. Hanks left foot slipped when he stepped from grating located over the steering rams. The main deck was not treated with a non-skid surface. The combination of hydraulic fluid, detergent and river water on the untreated deck made the deck dangerous.

The captain of the M/V MICHAEL A. knew that routine maintenance of the main deck included the addition of a non-skid suspension into the enamel deck paint. Despite this knowledge, the captain failed to take the obvious precaution of applying a

non-skid compound when he had the crew chip and re-paint the deck a few weeks before Hanks fell. After the deck was re-painted, several deck hands made complaints to the captain that the deck was dangerously slick. The captain took no action to make the deck safer. It is the court's conclusion that Luhr was negligent for its failure to supply a non-skid surface on the deck since such a surface was reasonably necessary to permit its employees to work in safety.

The slick condition of the deck caused Hanks to fall. The soapy, slick fluid coating the deck was a component of and incidental to the repair operation necessary to get the boat underway. The failure of the employer to apply a non-skid surface was a proximate cause of the unsafe condition of the deck upon which Hanks was required to work.

Luhr has failed to sustain its burden of proof to show that Hanks was contributorily negligent. The souging required Hanks to wash and to hose the stern of the boat where the steering rams are located. He had to stand on the metal grates to do a thorough job. He had to step down from the grate to clean the rest of the stern. While Hanks can be charged with knowledge that the deck was wet, he cannot be blamed for not knowing where the hydraulic fluid or other slick components might accumulate. In addition, he cannot be charged with negligence for the failure to apply a safe surface on the main deck.

Luhr contests the causal connection between Hanks fall and his condition of ill-being. Hanks is twenty-eight (28) years old. While Hanks had complained of back aches starting with his service in the Marines in 1988, the VA doctor who examined him in 1993 found that Hanks had a normal neurologic system and a normal musculoskeletal system. The doctor neither saw the need for further diagnostic work-up nor for additional medical treatment.

Hanks had no other medical treatment prior to being hired by

Luhr Brothers in March of 1994. Prior to his fall, Hanks worked for twenty-two months engaged in the very heavy work of a deck hand. During this period, he saw no doctors and lost no work due to back problems.

When Hanks' foot slipped on the M/V MICHAEL A., he landed on his buttocks and struck his back and head on the deck of the boat. He immediately complained of back and leg pain. Two months later he was diagnosed as having a herniated nucleus polposus at the L-5/S-1 level. His symptoms became unbearable and he underwent a lumbar discectomy on July 12, 1996. The surgeon opined, and the court agrees, that the fall caused the herniated disc or damaged a pre-existing disc which caused it to become symptomatic.

Luhr contends that Hanks will suffer only a very small wage loss over the course of the thirty-nine (39) year remainder of his working career. The greater weight of the evidence does not support this conclusion. His employment is limited to medium work which does not include repetitive heavy lifting, bending or climbing. He cannot return to the towboat to work. He has voluntarily undertaken retraining as an electrician, but will face physical limitations in that employment because of his operated back. The evidence supports the conclusion that Hanks will endure a wage loss differential.

After considering all the evidence and the arguments of counsel, the court enters judgment in favor of plaintiff, Rob Hanks, and against the defendant, Luhr Brothers, Inc. in the amount of $901,091.32 itemized as follows:

Pain and Suffering	$300,000.00
Disability	$200,000.00
Loss of Earnings	$390,000.00
Medical Expense	$ 11,091.32

/s/ Robert P. LeChien,
Associate Judge

March 9, 1998

c.c. Roy Dripps
James Herron

APPENDIX D

5-98-0405

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 97-L-117A

ROBERT HANKS,
Plaintiff-Appellee,

v.

LUHR BROTHERS, INC.,
Defendant-Appellant.

Appeal from the Circuit Court of St. Clair County

Honorable Robert P. LeChien,
Judge, presiding.

[Filed: March 9, 1999]

JUSTICE KUEHN delivered the opinion of the court:

Any seaman hurt on the job can sue for damages and, at his election, have a jury decide the outcome. 46 U.S.C. §688 (1994). When Congress passed the Jones Act, it made trial by jury a matter for the seaman to decide. Congress wanted the seaman's employer to abide by that decision. *Allen v. Norman Brothers, Inc.*, 286 Ill. App. 3d 1091, 678 N.E.2d 317 (1997).

Here, a Jones Act plaintiff wanted the judge rather than a jury to decide his case. Luhr Brothers, Inc. (Luhr), wanted a jury to decide it. The judge struck Luhr's jury demand and heard the case. He found for plaintiff and awarded $901,091.32.

Luhr appeals from the trial court's December 16, 1997, order denying its motion for trial by jury and from the March 9, 1998, judgment for plaintiff. We affirm.

Plaintiff, Robert Hanks, worked for Luhr as a deckhand on Luhr's river towboat, the MV Michael A. Early in the morning of January 31, 1996, the towboat's steering ram broke while the boat was operating on the Vermilion River in Louisiana in heavy winds. Plaintiff and one other deckhand, with the assistance of the towboat's captain, changed the ram. The rams operate on hydraulic fluid under pressure. The rams are located on the towboat's stern under removal grates that rest upon a metal framework. The grates are situated 10 to 14 inches above the towboat's deck. A channel running the full length of the deck exists for the purpose of keeping fluids from spilling out onto the deck from the grate area.

When the ram was changed, the hydraulic lines feeding the ram's cylinder had to be disconnected and bled to remove pressure. Some hydraulic fluid escaped during this repair, which was normal. Plaintiff acknowledged that trying to keep the hydraulic fluid off of the deck was within his job duties. The captain characterized the fluid loss in this case as minimal. Plaintiff testified that he contained the spillage at the ram but that some fluid may have spilled onto the grates or onto rigging resting on the grates.

After the ram was changed, the captain ordered plaintiff to clean the grates and deck. Plaintiff sprinkled soap powder into the grate area and began to hose down the area. In an area 10 to 14 inches from the grates, plaintiff's left foot slipped out from under him, and he fell, landing on his buttocks and striking his head on the deck. In attempting to get up, he slipped and fell again.

Plaintiff does not know whether or not he slipped on hydraulic fluid. He saw no fluid on the deck, and after he fell, he found none on his shoes. Plaintiff testified that the deck was wet from wind-driven waves.

The area of the deck where he fell had been painted just two

weeks prior to the accident. No nonskid additive was available on the towboat when the painting was done, and so the deck was painted without the additive. In the past, the nonskid additive was always added to the paint. Plaintiff testified that in the two weeks before this accident, he and other crew members complained to the captain and the pilot that the freshly painted area of the deck in question was slick. Despite their complaints, no corrective action was taken.

Plaintiff sustained a low-back injury in the form of a ruptured disc in this accident. In July 1996, plaintiff underwent a lumber discectorny. His orthopedic surgeon testified that by November 1996 plaintiff had reached maximum medical improvement. Plaintiff was given a return to duty without restriction in January 1997. The surgeon testified that plaintiff could not perform heavy industrial work but could return to a medium level of physical work.

Plaintiff had a history of two low-back injuries while in the United States Marine Corps, the second of which was in December 1991. In April 1993, plaintiff was examined by a Veterans Administration physician pursuant to some application for compensation or pension. Plaintiff told this physician that he had experienced constant low-back pain for the preceding 18 months with numbness in the upper parts of his leg down to his knees. However, upon examination, this physician found no neurological or musculoskeletal deficiencies or abnormalities.

Plaintiff's surgeon opined that the January 1996 accident either exacerbated a preexisting herniation or caused the herniation. After being informed of plaintiff's past medical history, plaintiff's surgeon testified that he believed that the disc was most likely bulging or ruptured prior to January 1996, although plaintiff had no symptoms suggestive of sciatica. In concluding, the surgeon testified that whatever the state of plaintiff's back prior to the January 1996 accident, something happened in the

January 1996 accident that resulted in plaintiff's increased symptoms.

Plaintiff had been employed as a deckhand for 22 months before the fall. His annual income was $25,914.

Plaintiff filed suit against Luhr in state court, alleging claims under the Jones Act, under general maritime law, and for maintenance and cure. He sought damages for the injuries he sustained as a result of his January 1996 fall. Luhr demanded a trial by jury. Luhr also filed an answer asserting contributory fault with respect to the Jones Act and maritime law claims.

On plaintiff's motion, the trial court struck Luhr's jury demand on June 3, 1997. Later, Luhr filed a motion seeking a trial by jury, with a supporting memorandum of law. The trial court denied Luhr's motion on December 16, 1997. The case proceeded to a bench trial on January 26 and 27, 1998. A judgment was entered in plaintiff's favor on March 9, 1998, in the amount of $901,091.32, plus court costs. Luhr filed a posttrial motion, which the trial court denied on June 1, 1998.

I. *JURY DEMAND*

Luhr initially appeals from the trial court's order striking defendant's jury demand. As the issue involves a review of federal statutory and constitutional law, we review *de novo* the trial court's order striking Luhr's jury demand.

Illinois Constitution — Jones Act

State and federal courts have concurrent jurisdiction over a Jones Act (46 U.S.C. §688 (1994)) claim. *Allen v. Norman Brothers, Inc.*, 286 Ill. Ap. 3d 1091, 1094, 678 N.E.2d 317, 319 (1997), citing 45 U.S.C. §56 (1988). Under the Jones Act, only the plaintiff can elect to have the case heard by a jury. *Allen*, 286 Ill. App. 3d at 1094-95, 678 N.E.2d at 319-20, citing *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1213 (5th Cir. 1986); *Craig v.*

Atlantic Richfield Co., 19 F.3d 472, 476 (9th Cir. 1994).

The Illinois Constitution guarantees the right to a jury trial if the claim existed at common law. *Allen*, 286 Ill. App. 3d at 1095, 678 N.E.2d at 320, citing *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 72, 643 N.E.2d 734, 753 (1994). The Jones Act did not exist at common law. *Allen*, 286 Ill. App. 3d at 1094, 678 N.E.2d at 319. Therefore, as we previously and unambiguously stated, Jones Act defendants have no right to a jury trial in Illinois state courts. *Allen*, 286 Ill. App. 3d at 1096, 678 N.E.2d at 320-21.

Illinois Constitution — General Maritime Claims

State courts have jurisdiction over general maritime claims because of the savings-to-suitors clause of section 1333 of the Judiciary Act (28 U.S.C. §1333 (1994)). That section provides that the United States district courts shall have original jurisdiction, exclusive of the courts of the states, of all civil cases of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Plaintiff's unseaworthiness and maintenance-and-cure claims are considered admiralty claims to which no jury trial right attaches. *Allen*, 286 Ill. App. 3d at 1096, 678 N.E.2d at 321, citing *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 17, 10 L. Ed. 2d 720, 722, 83 S. Ct. 1646, 1648 (1963). Luhr cites numerous old cases that predate the enactment of the Jones Act in which the injured seamen received jury trials. None of the cited cases mention who demanded the jury trial. Furthermore, the states involved in the cited cases may have constitutional provisions that allow for jury trials in all cases. The vast majority of the cases cited involve common law negligence and not traditional admiralty claims. One of the cases was in federal court on a diversity basis, and because of the diversity, the seventh amendment became applicable, providing defendant a jury trial right. U.S. Const. amend. VII. In short, nothing in these cases stands for the

proposition that the defendant has a jury trial right in a traditional admiralty case heard in Illinois state court.

Jones Act — Contributory Negligence Claim

Luhr contends that section 53 of the Federal Employers' Liability Act (FELA) (45 U.S.C. §53 (1994)), as incorporated into the Jones Act (46 U.S.C. §688 (1994)), provides a defendant with a right to a jury trial with respect to the defendant's contributory negligence claim.

This issue is controlled by a recent opinion handed down by this court. Applying our recent case law, we find that the reference to a jury within section 53 of the FELA confers no right upon a defendant to demand a jury in a Jones Act case. *Gibbs v. Lewis & Clark Marine, Inc.*, 298 Ill. App. 3d 743, 750, 700 N.E.2d 227, 232 (1998). As previously stated, any such construction "would contravene the plaintiff's expressly articulated right to elect a jury trial or nonjury trial in such cases." *Gibbs*, 298 Ill. App. 3d at 750, 700 N.E.2d at 232.

Equal Protection

Next, we are asked to decide whether the trial judge's rejection of Luhr's call for a trial by jury constituted a deprivation of Luhr's right to the equal protection of the law. We hold that it did not.

The fourteenth amendment reads in pertinent part, "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. This right extends to corporations as well as natural persons. *Power Manufacturing Co. v. Saunders*, 274 U.S. 490, 493, 71 L. Ed. 1165, 47 S. Ct. 678, 679 (1927).

The phrase "equal protection of the laws" found its way into our federal constitution in response to a southern brand of justice immediately following the civil war. Freedmen stood without

the protection of the southern states' criminal laws. KluKluxery prevailed throughout southern states, where its crimes against black victims went unattended. Thus came passage of the Ku Klux Klan constitutional amendments and enabling legislation designed to assure that *states* provided "equal protection of the laws." See R. Kennedy, Race, Crime & the Law (1997).

The genesis of this constitutional provision reminds us that the fourteenth amendment "was intended to regulate only conduct by the States or their instrumentalities." *Shelley v. Kraemer*, 334 U.S. 1, 13, 92 L. Ed. 1161, 1180, 68 S. Ct. 836, 842 (1948). At oral argument, Luhr insisted that its claim rests upon the equal protection clause of the fourteenth amendment and not the due process clause of the fifth amendment (U.S. Const., amend. V). Thus, to prevail, Luhr must demonstrate state action.

Luhr points out that actions by state judicial officers can constitute state action. See *Shelley*, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836. It argues that the judge's interpretation of the Jones Act, not the federal statute itself, was the source of the equal protection violation. Luhr thus concludes that striking its jury demand constituted the state action necessary to invoke the fourteenth amendment's constitutional protection.

Although we question whether a state court's interpretation of federal law could ever trigger the equal protection clause, we are quite certain that it did not trigger it in this case. The right to a trial by jury in a case brought under the Jones Act is a substantive matter governed by federal law. *Allen* v. *Norman Brothers, Inc.*, 286 Ill. App. 3d 1091, 1096, 678 N.E.2d 317, 321 (1997), citing *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 363, 96 L. Ed. 398, 404, 72 S. Ct. 312, 315 (1952). The judge's interpretation and subsequent application of that federal law to strike Luhr's jury demand were correct. Following clear federal precedent, we have repeatedly held that a Jones Act defendant has no right to a trial by jury. See *Allen*, 286 Ill. App. 3d 1091,

678 N.E.2d 317; *Gibbs v.. Lewis & Clark Marine, Inc.*, 298 Ill. App. 3d 743, 700 N.E.2d 227 (1998).

Since the trial judge merely executed a congressional intent to allow plaintiff the exclusive right to elect a trial by jury and the judge struck a jury demand that Congress did not contemplate, the true source of the alleged disparate treatment was the federal statute itself. Congress conferred on plaintiff the exclusive right to trial by jury, and Congress was not obliged to abide by fourteenth amendment constraints when it did so. Luhr's concerns over the disparate treatment of parties under the Jones Act are directed at federal rather than state action. The constitutional redress of those concerns rests, if at all, within the constraints imposed upon the federal government under the due process clause of the fifth amendment.

In the absence of state action necessary to precipitate fourteenth amendment guarantees, an equal protection claim cannot be validly raised. Since there was no state action to offend the equal protection clause, its imperative was not violated in this case.

II. *JUDGMENT IN PLAINTIFF'S FAVOR*

Luhr next contends that the trial court erred in entering judgment in plaintiff's favor. Specifically, Luhr argues that there was no credible evidence that plaintiff slipped on a combination of hydraulic fluids, detergent, and river water.

A trial court's ruling in a bench trial will not be overturned unless that ruling is contrary to the manifest weight of the evidence. *Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc.*, 251 Ill. App. 3d 17, 29, 620 N.E.2d 1349, 1357 (1993), *aff'd*, 162 Ill. 2d 99, 642 N.E.2d 470 (1994).

No one saw plaintiff fall. In answer to Luhr's interrogatories, plaintiff claimed that after he finished his work and stepped down from the steel grating covering the steering machinery, the

deck felt greasy. He further claimed that the deck was unsafe and unseaworthy because it was slick due to a combination of the slick liquid on the deck and the lack of nonskid deck covering. At trial, plaintiff and his captain testified that the release of hydraulic pressure was normal. Some hydraulic fluid could have spilled out onto the steel grating, requiring cleaning. Plaintiff did not recall seeing hydraulic fluid in the area in which he fell, and there was none on the bottom of his shoes after the fall. Testimony at trial established that the deck was awash with river water.

The trial court concluded that Luhr was negligent "for its failure to supply a non-skid surface on the deck since such a surface was reasonably necessary to permit its employees to work in safety." Furthermore, the trial court found: "The slick condition of the deck caused [plaintiff] to fall. The soapy, slick fluid coating the deck was a component of and incidental to the repair operation necessary to get the boat underway. The failure of the employer to apply a non-skid surface was a proximate cause of the unsafe condition of the deck upon which [plaintiff] was required to work."

Under the Jones Act, the employer is imposed with a nondelegable duty to furnish its employees with a safe work place. 46 U.S.C. §688 (1994). There is no dispute that the deck of this vessel was not coated with a nonskid surface and that, at a minimum, water was present on the deck's surface. The evidence of the failure to furnish a nonskid surface is sufficient to submit negligence and unseaworthiness theories to the court. See *Borgen v. Richfield Oil Corp.*, 257 F.2d 505, 507 (9th Cir. 1958).

Given the lack of a nonskid surface and the presence of water on the deck of this vessel, we find that a conclusion opposite to that reached by the trial court is not clearly evident. Accordingly, we find that the judgment of the trial court should be upheld.

III. *DAMAGES AWARD*

Luhr next charges that the trial court's damages award was not consistent with or supported by the evidence. The trial court's March 9, 1998, judgment was itemized as follows:

Pain and Suffering	$300,000.00
Disability	$200,000.00
Loss of Earnings	$390,000.00
Medical Expense	$ 11,091.32

With respect to the award for pain and suffering and disability, Luhr contends that since plaintiff's surgeon could not causally connect plaintiff's injury to this accident, the awards are not supported by the evidence. If the surgeon's testimony was what Luhr purports it to be, then Luhr might have a valid point. However, plaintiff's surgeon did causally connect the injury to this accident by way of an aggravation, stating:

> "[Plaintiff] could have had chronic low back pain and continued working and then had an injury and increased the size of the disc rupture, or he may have had discogenic pain without a disc rupture, or he could have had a disc rupture that bothered him and then was aggravated by his accident and caused to be more symptomatic than his prior complaints."

In addition to this surgeon's testimony, the trial court was able to consider the fact that while plaintiff may have had a history of back pain, he had worked at his Luhr heavy-labor job for almost two years without incident.

We find that the awards for pain and suffering and disability are adequately supported by the record and that the trial court's decision is not contrary to the manifest weight of the evidence.

Luhr also argues that the loss-of-earnings and disability awards are excessive. Each party presented expert testimony. Luhr's argument is essentially that the trial court should have disregarded plaintiff's experts in favor of Luhr's experts.

The trial court heard the testimony of the witnesses. Obviously, the testimony was conflicting. We will not second-guess the trial court's decision when testimony was given that supports the court's decision. Accordingly, we find that the trial court's awards were not contrary to the manifest weight of the evidence.

IV. *CONTRIBUTORY NEGLIGENCE*

Luhr finally contends that the trial court erred in concluding that plaintiff was not contributorily negligent. Specifically, Luhr believes that plaintiff must be charged with the knowledge that hydraulic fluid or slick components might accumulate on the deck. Luhr's argument is premised largely upon the idea that plaintiff admitted responsibility for keeping hydraulic fluid from spilling onto the deck.

A Jones Act seaman bears the duty to act with ordinary prudence under the circumstances. *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997). In this case, the steering ram required repair. The hydraulic line associated therewith was under pressure and had to be opened as a part of the steering ram's repair. Plaintiff's deckhand coworker testified that some of the hydraulic fluid spills out onto the deck during this procedure. The captain testified that hydraulic fluid sprays out when a line under pressure is opened. Plaintiff merely testified that he, as a deckhand, would attempt to contain the hydraulic fluid. The day of the accident was particularly windy. In this case, there was apparently a mess on the deck after the repair was completed, as the captain ordered the deckhands to soap down the deck. There was testimony that once the soap and water solution was utilized, the hydraulic fluid could no longer be visualized on the deck's surface.

Given these facts, we believe that the trial court's order finding that plaintiff was not contributorily negligent is consistent with the evidence.

Accordingly, for the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

Affirmed.

WELCH and HOPKINS, JJ., concur.

APPENDIX E

The Jones Act, 46 U.S.C. app §688(a):

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . .

APPENDIX F

The Federal Employers' Liability Act, 45 U.S.C. §53:

In all actions on and after April 22, 1908 brought against any such commercial carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for safety of employees contributed to the injury or death of such employee.

APPENDIX G

U.S. Const., amend. XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
OCT 1 1999
OFFICE OF THE CLERK

No. 99-386

In The

Supreme Court of the United States

LUHR BROS., INC.,

Petitioner,

v.

ROBERT HANKS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court For The Fifth District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Panama Railroad Co. v. Johnson* (1924), 264 U.S. 375, 68 L.Ed. 748, 44 S.Ct. 391, which held constitutional the Jones Act's grant to "injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers," should be revisited in the absence of Congressional amendment or a conflict in the lower courts?

2. Whether this Court should consider petitioner's statutory interpretation argument, which conflicts with this Court's decisions in *Cortes v. Baltimore Insular Line, Inc.* (1932), 287 U.S. 367 and *Cox v. Roth* (1955), 348 U.S. 207?

3. Whether this Court should consider an equal protection claim in the absence of state action under Amendment XIV when this Court has already held the Jones Act's election clause constitutional under Fifth Amendment Due Process in *Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924)?

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1. This Court's decision in *Panama Railroad Co. v. Johnson,* which held constitutional the Jones Act's grant to "injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers," should not be revisited in the absence of Congressional amendment or a conflict in the lower courts 3

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STATEMENT OF THE CASE

Although petitioner does not raise a sufficiency of the evidence argument, it misstates the facts and ignores the trial court's specific findings. Specifically, evidence supported the trial court's conclusion that the work-related "fall caused the herniated disc or damaged a pre-existing disc [rupture] which caused it to become symptomatic." Trial Court Order, A-5. The evidence also supported the trial court's finding that respondent "will endure a wage loss differential." Trial Court Order, A-5. The Illinois Appellate Court specifically reviewed those findings for evidentiary support and found "that the awards for pain and suffering and disability are adequately supported by the record. . . ." Appellate Court Opinion, A-15.

HOW THE FEDERAL QUESTION WAS PRESENTED

Although petitioner did raise an equal protection claim under Amendment XIV in the Illinois courts, it never claimed a Fifth Amendment Due Process violation. (C.287-310) This Court might not treat the invocation of the wrong amendment as a waiver of the constitutional claim, but this case presents an unusually conscious waiver. Petitioner expressly eschewed any Fifth Amendment claim at oral argument in the State court. Appellate Court Opinion, A-12. "At oral argument, [petitioner] insisted that its claim rests upon the equal protection clause of the fourteenth amendment and not the due process clause of the fifth amendment." Appellate Court Opinion, A-12. Thus, any Fifth Amendment claim has

been expressly and consciously waived in favor of a Fourteenth Amendment challenge.

This Fourteenth Amendment position poises Petitioner between the Scylla of adequate state grounds for the decision below and the Charybdis of lack of state action to trigger fourteenth amendment protection. Petitioner admits that the denial of its Illinois constitutional claim is not an independent state ground for the decision below. Petition for *Certiorari*, p. 4, fn 1. However, Petitioner has failed to identify any Illinois constitutional provision, statute or rule which deprives it of a federal right. Petitioner's only claim of state action was the state court's application of the federal statute as construed by this Court, three United States Courts of Appeals, and numerous state courts. (C.287-310) The Illinois court held that application of the federal statute by a state court was not state action within the meaning of the Fourteenth Amendment.

REASONS FOR DENYING THE PETITION

A. The Petition Should Be Denied Because It Fails to Present A Significant Question

The petition for writ of *certiorari* should be denied because this case meets none of the factors set forth in Rule 10, Supreme Court Rules. The petition inappropriately treats settled points of law as undecided issues and wrongly claims a conflict between the lower courts where none exists. This Court has already held that the "election" clause of the Jones Act is constitutional. *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 68

L.Ed. 748, 44 S.Ct. 391, 396 (1924). There is no conflict between the decision sought to be reviewed and a decision of this Court nor of a State court of last resort nor of any federal Court of Appeals. The petition for *certiorari* fails to cite a single case which holds that the Jones Act confers on the defendant the right to demand a jury trial or that the "election" clause of the statute is unconstitutional. In sum, the petition fails to establish a convincing reason to grant *certiorari*.

1. This Court's decision in *Panama Railroad Co. v. Johnson*, which held constitutional the Jones Act's grant to "injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers," should not be revisited in the absence of Congressional amendment or a conflict in the lower courts.

The Jones Act provides that a seaman "may, at his election, maintain an action for damages at law, with the right of trial by jury . . . ." 46 U.S.C. § 688(a). "The 'election' contemplated by the Jones Act is primarily a decision as to the form of trial – whether jury or non-jury." *McAfoos v. Canadian Pacific Steamships, Ltd.*, 243 F.2d 270, 273 (2d Cir. 1957). The federal courts have unanimously interpreted the "election" language as giving only the seaman-plaintiff the right to demand a jury. *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 392 (1924); *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 475-476 (9th Cir.), *cert. denied*, 513 U.S. 875 (1994); *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1489 (5th Cir.), *cert. denied*, 506 U.S. 975 (1992); *Rachal v. Ingram Corp.*, 795 F.2d

1210 (5th Cir. 1986); *McCarthy v. American Eastern Corp.*, 175 F.2d 724, 726 (3rd Cir. 1949).

In *Panama Railroad*, this Court rejected a due process challenge to the Jones Act's election language. In reaching the due process issue, the Court noted that the election clause of the Jones Act "permits injured seamen to elect between varying measures of redress and between different forms of action *without according a corresponding right to their employers. . . .* " *Panama Railroad*, **supra**, 264 U.S. 375, 392 (emphasis added). The Court concluded that "the right to choose cannot be accorded to both parties. . . . " 264 U.S. 375, 393.

The petition's initial premise – that "Congress did not intend to deny a Jones Act defendant the right to a jury trial or confer that right exclusively to the plaintiff seaman" (Petition for *Certiorari* at p.7) – is therefore simply wrong. Petitioner does not contend that an amendment to the statute requires this Court to revisit a previously settled area. Although Congress has now had seventy five years in which to repeal or amend the election language of the Jones Act, it has not done so. Congress did act in 1982, however, to limit the statute's application to alien and other foreign seamen. 46 U.S.C. § 688(b), Amendment of December 29, 1982, Pub.L. 97-389, Title V, § 503(a), 96 Stat. 1955. This is strong evidence of Congressional acquiescence in the *Panama Railroad* decision, rather "than mere congressional silence and passivity." *Flood v. Kuhn*, 407 U.S. 258, 283 (1972).

The state courts also agree that a Jones Act defendant has no right to demand a jury trial because the statute gives that "election" to the plaintiff-seaman. *Parker v.*

Rowan Cos., 599 So.2d 296, 298 (La.1992); *Heinhuis v. Venture Associates, Inc. of Louisiana*, 558 So.2d 1244 (La.App. 1990); *Allen v. Norman Brothers, Inc.*, 286 Ill.App.3d 1091, 1094, 678 N.E.2d 317, 318 (1997); *Gibbs v. Lewis & Clark Marine, Inc.*, 298 Ill.App.3d 743, 700 N.E.2d 227 (1998); *Peters v. City & County of San Francisco*, 1995 A.M.C. 788 (Cal.App. 1994) (unpublished decision). As the Louisiana Supreme Court noted, "respondents alone have control over whether the case is to be tried to a judge or jury." *Parker*, 599 So.2d at 298.

Although petitioner's citation of *Yates v. Dann*, 223 F.2d 64 (3rd Cir. 1955) creates an appearance of conflict, that case was decided under Rule 38 of the Federal Rules of Civil Procedure and not under the election clause of the Jones Act. "Any attempt to withdraw the [jury] demand without the respondents' consent could not succeed. [citation] *There is nothing in the Jones Act or in the peculiar procedural circumstances of this litigation which alters the application of this fundamental guarantee.*" *Yates v. Dann*, 223 F.2d 64, 66 (3rd Cir. 1955) (emphasis added). *Yates* has absolutely nothing to do with interpreting the Jones Act's "election" language. The failure of that decision even to mention *McCarthy v. American Eastern Corp.*, 175 F.2d 724, 726 (3d Cir. 1949), decided in that circuit only five years previously, strongly suggests that interpretation of the "election" clause was not before the court. *Yates*, therefore, is not in conflict with the decision below.

The petition should be denied because it has failed to articulate any basis to revisit an issue previously decided by this Court.

2. This Court should not consider petitioner's statutory interpretation argument, which ignores the plain language of the Jones Act and conflicts with this Court's decisions in *Panama Railroad Co. v. Johnson*, *Cortes v. Baltimore Insular Line, Inc.*, and *Cox v. Roth*

Petitioner's strained attempt to engraft a jury trial right onto the Jones Act by reference to the Federal Employers' Liability Act (45 U.S.C. §§ 51, *et seq.*) ignores the plain language of the Jones Act. "It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language." *U.S. v. Apfelbaum*, 445 U.S. 115, 121 (1980). Courts may deviate from the plain language of a statute only in "rare and exceptional circumstances." *Ardestani v. INS*, 502 U.S. 129, 135 (1991).

The Jones Act's "election" clause specifically confers on the seaman-plaintiff the right to elect the form of trial. 46 U.S.C. § 688(a); *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 392 (1924). The Jones Act "permits injured seamen to elect between varying measures of redress and between different forms of action *without according a corresponding right to their employers. . . .* " *Panama Railroad*, **supra**, 264 U.S. 375, 392 (emphasis added).

The Courts of Appeals which have considered the issue have uniformly held that the Jones Act confers no right to jury trial on the defendant. *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 475-476 (9th Cir.), *cert. denied*, 513 U.S. 875 (1994); *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1212-1213 (5th Cir. 1986); *Texas Menhaden Co. v. Palermo*,

329 F.2d 579, 580 (5th Cir. 1964); *McCarthy v. American Eastern Corp.*, 175 F.2d 724, 726 (3d Cir. 1949).

One state court has rejected the exact argument advocated by petitioner:

> Since the Jones Act contains its own limitations on jury trials and specifically states that only the plaintiff can demand a jury trial, and since the right to a jury trial under the FELA is only *implied*, the specific provisions of the Jones Act control in the case at bar. Such a construction is also *required* because obviously the Jones Act, by incorporating the FELA by reference, post-dates the FELA. While the general provisions of the Jones Act adopt the FELA, the specific provisions grant the plaintiff *at his election*, the sole right to seek a jury. It would be contrary to the express statutory language passed by Congress to hold that the jury provisions of section 53 of the FELA were adopted as part of the Jones Act. To the contrary, Congress adopted language absolutely inconsistent with the petitioner's position. *Gibbs v. Lewis & Clark Marine, Inc.*, 298 Ill.App.3d 743, 700 N.E.2d 227 (1998) (italics by the court).

There are no contrary cases anywhere, by any court.

Petitioner's argument hinges on the tacit assumption that these holdings and the plain language of the Jones Act do not exist. Because Petitioner has offered no basis to ignore the plain language of the "election" clause or *Panama Railroad*, its argument should be rejected.

Assuming, *ad arguendo*, that *Panama Railroad* is not dispositive of this issue, the petition's premise that rights implicit in the FELA (45 U.S.C. §§ 51, *et seq.*) control over

the explicit grant in the Jones Act is untenable. This Court's decisions in *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932) and *Cox v. Roth*, 348 U.S. 207 (1955) teach that, contrary to petitioner's position, language may not simply be cut from the FELA and pasted onto the Jones Act.

Although the FELA (45 U.S.C. §§ 51, *et seq.*) did not at the time[1] bar assumption of the risk as a complete defense, this Court in *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932), held that assumption of the risk was not a complete defense to Jones Act liability, but rather subject to the admiralty comparative fault doctrine.

In *Cox v. Roth*, 348 U.S. 207 (1955) this Court held that the failure of the FELA to provide specifically for an action against the defendant's estate did not preclude such an action under the Jones Act.

> The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met *in the admiralty setting*. *Cox v. Roth*, 348 U.S. 207, 209 (1955) (emphasis added).

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[1] The FELA was amended in 1939 to abolish the defense of assumption of the risk. 45 U.S.C. § 54 was amended by the act of August 11, 1939, c. 685, § 1, 53 Stat. 1404.

Thus, the underlying premise of petitioner's argument – that a jury trial right implicit in the FELA controls over the specific language of the Jones Act – is completely inconsistent with this Court's analysis of the relationship between the two statutes. Petitioner's statutory construction argument forms no basis to grant *certiorari*.

Schulz v. The Pennsylvania R.R. Co., 350 U.S. 523 (1956), relied on heavily by petitioner (Petition for *Certiorari* at 10-11), does not even address the "election" clause of the Jones Act. *Schulz* simply held that there was sufficient evidence to avoid a directed verdict on the issues of causation and negligence and is completely inapposite to the issues posed by the petition.

Respondent respectfully submits that the petition's statutory construction argument fails to provide a basis on which to grant *certiorari*.

3. This Court should not consider an equal protection claim when petitioner has failed to demonstrate state action under Amendment XIV and when this Court has already held the Jones Act's election clause constitutional under Fifth Amendment Due Process analysis

Petitioner's equal protection argument suffers from two fatal flaws which preclude reaching any of the equal protection analyses proffered by Petitioner. First, Petitioner expressly waived in the state court any Fifth Amendment claim it may have had. Appellate Court Opinion, A-12. Second, Petitioner's argument fails to establish "state action" sufficient to trigger application of the Fourteenth Amendment. Assuming that Petitioner's

claim may properly be re-cast as a Fifth Amendment rather than Fourteenth Amendment violation, the statute has already been held not tc violate Fifth Amendment due process on the very ground now asserted. *Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924). In the event that this Court does reach the equal protection challenge posed by Petitioner, there is a rational basis for the Congressional classification.

The petitioner's equal protection claim ironically has been that application of a federal statute constitutes state action. Appellate Court Opinion at A12-13. The Fourteenth Amendment was intended to regulate only conduct by the States or their instrumentalities. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); see *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979) (White, concurring); cf. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (no state action in absence of showing state regulation at least influenced decision). The respondent's claim – and petitioner's defenses – were founded on a federal statute, the Jones Act, 46 U.S.C. § 688(a). No claim or defense was based on any state law and petitioner does not claim the contrary. This failing precludes petitioner's Fourteenth Amendment challenge since the reason petitioner has no jury trial right in this matter is not state action, but a federal statute. See generally *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307 (5th Cir. 1978); *Simpson v. United States*, 42 F.2d 643 (7th Cir. 1965).

Petitioner expressly disclaimed that the "election" clause of the Jones Act should be measured against an equal protection guarantee incorporated into the due process clause of Amendment V. The state court noted that

"[a]t oral argument, [petitioner] insisted that its claim rests upon the equal protection clause of the fourteenth amendment and not the due process clause of the fifth amendment." Appellate Court Opinion, A-12. Given this express waiver, it would be inappropriate to extend judicial grace to consider a Fifth Amendment challenge now. See *Harris v. McRae*, 448 U.S. 297, 311 at fn. 17 (1980) (specifically raising Fifth Amendment equal protection claim); *compare San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 542, fn. 21 (1987) (re-formulating Fourteenth Amendment challenge as Fifth Amendment claim). This may have been simply a tactic to avoid the *Panama Railroad* holding; however, it should be treated as "an intentional relinquishment or abandonment of a known right or privilege" (*Brewer v. Williams*, 430 U.S. 387, 404 (1977) *quoting Johnson v. Zerbst*, 304 U.S. 458, at 464 (1938)), to preclude a Fifth Amendment challenge to the statute now.

Should this Court wish to consider the petition's claim as arising under the equal protection component of the due process clause of the Fifth Amendment, respondent respectfully submits that this Court's decision in *Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924) is dispositive of the issue. "But it never has been held, nor thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law." *Panama Railroad*, 264 U.S. 375, 392-393.

Assuming *ad arguendo* that this Court chooses to consider petitioner's equal protection claim as arising under the Fifth Amendment, *Panama Railroad* is still dispositive.

"Although 'the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." ' *Schneider v. Rusk*, 377 U.S. 163, 168 (1964)." *Richardson v. Belcher*, 404 U.S. 78, 81 (1971).

But this Court has already determined in *Panama Railroad*, **supra**, that the "election" clause of the Jones Act does not violate the due process clause of the Fifth Amendment. Because the alleged discrimination in this case does not violate due process, the Fifth Amendment equal protection component cannot be violated.

Moreover, the Fifth Amendment equal protection component is not co-extensive with that of the Fourteenth Amendment when an important national interest is involved. "Although both Amendments require the same type of analysis, see *Buckley v. Valeo*, 424 U.S. 1, at 93 (1976, slip op., at 87), the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

In this case, the challenged provision of the Jones Act implicates an overriding national interest in maritime affairs. As the Petition notes, federal admiralty and maritime law has been "a special concern of this Court from the earliest days of the Republic." Petition for Writ of *Certiorari*, at p. 5. The Constitution established admiralty and maritime law as an overriding national interest by

extending federal judicial power to "all Cases of admiralty and maritime jurisdiction." U.S. Const. Art. III, § 2.

Assuming for the purposes of argument that traditional Fourteenth Amendment considerations apply to this case, petitioner has failed to identify a property interest (see *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575 (1979)), a protected class, such as race (see *Brown v. Board of Education*, 347 U.S. 483 (1954)) or a fundamental right, such as marital status (see *Boddie v. Connecticut*, 401 U.S. 371 (1971)) which would trigger anything other than "rational basis" analysis. The right to trial by jury guaranteed by the Seventh Amendment is not so fundamental as to be required of state courts by the due process clause of the Fourteenth Amendment. *Hill v. McKeithen*, 409 U.S. 943 (1972). The Fourth Circuit has held similarly with regard to the equal protection clause of the amendment. *Letendre v. Fugate*, 701 F.2d 1093 (4th Cir. 1983). Because no property interest, suspect class nor fundamental right is involved, the rational basis standard of review is required. *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955).

"If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

This Court need not search far to find a rational basis for the Congressional classification at issue. Defendant's argument boils down to a claim that, because the statute precludes defendant from a jury trial in a Jones Act case

when railroads may obtain a jury trial in an FELA case, the statute is unconstitutional. Yet the Constitution itself distinguishes between maritime relations and all others. U.S. Const., Art. III, sec. 2, cl. 1. This Constitutional provision empowers Congress to give either party the right to trial by jury in a maritime case. *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 12 How. 443 (1851).

Aside from this Constitutional distinction, federal statutes frequently classify occupations and remedies without constitutional infirmity. Longshoremen and stevedores are treated differently from seamen, receiving not a jury trial with damages unlimited by statute, but what is essentially a workers' compensation remedy with trial to a longshore commissioner. See generally 33 U.S.C. §§ 901, *et seq.* This is a constitutional exercise of Congressional authority. *L'Hote v. Crowell*, 286 U.S. 528 (1932). Longshoremen are deprived by 33 U.S.C. § 905(b) of their common law right to recover for the unseaworthiness of the vessel. This, too, is constitutional. *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir. 1977), *cert. denied*, 434 U.S. 861. Railroad employees are treated differently than the vast majority of American workers who are covered by state workers compensation laws. See Federal Employers Liability Act, 45 U.S.C. §§ 51, *et seq.* The FELA's imposition of liability only on railroads, and not other interstate carriers is constitutional. *Second Employers' Liability Cases*, 223 U.S. 1, 52-53, 56 L.Ed. 327, 32 S.Ct. 169 (1912).

Tested in light of this substantial precedent, defendant's equal protection claim is completely meritless.

Historic admiralty principles, considerations of maritime uniformity, and the seaman's historical vulnerability to his employer's will also provide rational bases for the seaman's election of the form of trial.

Historically there was no provision "from which it can be inferred that civil causes in admiralty were to be tried by a jury, contrary to what the framers of the constitution knew was the mode of trial of issues of fact in the admiralty." (*Waring v. Clark*, 46 U.S. 441, 460 (1847); see also *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 475 (9th Cir. 1994), **citing** *Waring*.) This historical procedure provides a rational basis for treating shipping companies and railroads differently and, therefore, there is no equal protection violation. See *Williamson v. Lee Optical*, **supra**, 348 U.S. 483, 489.

The seaman's well-known vulnerability also provides a rational basis for the Congressionally mandated election. This Court has treated the injured seaman as a "ward of admiralty." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); see also *The David Pratt*, F.Cas. No. 3597 (D.C. Me. 1839), *quoted in* Norris, *The Law of Seamen*, 4th Ed. 1985, section 24:2, p. 663. The peculiar vulnerability of the seaman provides a rational basis for the Congress to give seamen exclusively the option of a jury or non-jury trial, thus allowing the injured seaman to weigh the benefits and risks of each mode of trial, including the relative speed to hearing afforded by each method. See, **e.g.**, *Hernandez v. Power Construction Co.*, 73 Ill.2d 90, 382 N.E.2d 1201 (1978) (taking judicial notice of two year's greater delay in getting case to jury trial than bench trial). This is an entirely proper Congressional concern and the

"election" clause of the Jones Act reasonably effects that purpose.

In sum, petitioner has offered no basis to grant *certiorari* in this case.

CONCLUSION

For all of the foregoing reasons, the Petition for *certiorari* should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

LUHR BROS., INC.,

Petitioner,

v.

ROBERT HANKS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court For The Fifth District

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondent, in his opposing brief, misstates the holding in *Panama Railroad v. Johnson*, 264 U.S. 375 (1924), in an apparent attempt to mislead this Court into believing that it has "interpreted the 'election' language as giving only the seaman-plaintiff the right to demand a jury" in a suit at law under the Jones Act. (Brief in Opp., p. 3). Contrary to Respondent's claim, this Court, in *Panama Railroad*, did not hold that the Jones Act gives the plaintiff-seaman the exclusive right to elect between a jury trial and a bench trial. Rather, this Court held that the "election" contemplated by the Jones Act is the choice between proceeding on the admiralty side of the federal court without a jury trial or "on the common-law side of the court with a trial by jury as an incident." *Id.* at 390-91.

Respondent's mischaracterization of *Panama Railroad* is designed to avoid the consequence of his election to pursue his claim in state court. As this Court stated in *Panama Railroad*, "[o]n the [admiralty] side the issues will be tried by the court; but if [the seaman] sues on the common-law side, there will be a right of trial by jury." *Id.* at 391. When Respondent elected to proceed in state court, he necessarily elected to proceed "at law" because state courts, unlike the federal courts, do not recognize the dichotomy of proceeding "at law" versus "in admiralty." Simply put, there is no "admiralty side" to the state courts. Therefore, the right to trial by jury flows as an incident to Respondent's election to pursue his claim at law in the state court.

The importance of resolving the interpretation of the election language of the Jones Act is the principal reason

that this case warrants certiorari. It is significant that Respondent did not contend that the issue lacked sufficient importance for consideration by this Court, but instead sought to avoid certiorari by erroneously contending this Court has already made the interpretation.

Respondent also misrepresents the holding in *McCarthy v. American Eastern Corp.*, 175 F.2d 724 (3d Cir. 1949), when he cites it as support for his claim that the federal courts have unanimously interpreted the election language to give only the seaman-plaintiff the right to demand a trial by jury. The Third Circuit in *McCarthy* echoed this Court's holding in *Panama Railroad*, declaring that "the election to which the Jones Act refers is an election of remedies as between a suit in admiralty and a civil action." *McCarthy*, 175 F.2d at 726. Further, contrary to Respondent's contention, the decision in *McCarthy* is consistent with *Yates v. Dunn*, 223 F.2d 64 (3d Cir. 1955), as *Yates* recognized that the election granted to the plaintiff-seaman is "between a trial by jury and a suit in admiralty." *Yates*, at 66 (quoting *Balado v. Lykes Bros. S.S. Co.*, 179 F.2d 943, 945 (2d Cir. 1950)). Thus, the true import of these cases is that the only manner in which the plaintiff-seaman can force a non-jury trial is to elect to proceed on the admiralty side of the federal court. In his Brief in Opposition, Respondent refuses to acknowledge that, on this basis, the Third Circuit's decisions conflict in principle with *Rachel v. Ingram Corp.*, 795 F.2d 1210 (5th Cir. 1986), and *Craig v. Atlantic Richfield Co.*, 19 F.3d 472 (9th Cir. 1994).

Respondent fails to address, in his opposing brief, the effect of the incorporation of the jury provision of Federal Employers' Liability ("FELA"), 45 U.S.C. § 53,

into the Jones Act. Respondent instead asserts that "the Jones Act's 'election' clause specifically confers on the seaman-plaintiff the right to elect the form of trial." (Brief in Opp., p. 6). Significantly, Respondent does not quote any language from the "election" clause that he contends "specifically confers" the right to elect a non-jury trial in a Jones Act case brought at law. Respondent's failure to quote this supposed "plain language" underscores the fact it does not exist. Rather, the Jones Act provides that "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, **with the right of trial by jury** . . . " 46 U.S.C. app. § 688(a) (emphasis added). The *Panama* decision, in effect, concluded that the election clause meant what it clearly said. There is, therefore, no conflict between this provision of the Jones Act and § 53 of the FELA.

Respondent further misstates Petitioner's position on the equal protection issue when he erroneously contends that Petitioner is challenging the constitutionality of the Jones Act, a federal statute, and, therefore, there is no state action to trigger application of the Fourteenth Amendment. This contention is faulty because Petitioner's equal protection challenge is directed to the state court's misinterpretation of the Jones Act, not the Jones Act itself. The Jones Act does not prohibit a defendant from demanding and receiving a jury trial in an action filed at law and, therefore, it is the state court's misinterpretation of the Jones Act which is the source of the violation of the Jones Act defendant's right to equal protection. Respondent refuses to accept the fact that this

misinterpretation of a federal statute by the state court constitutes state action.

Finally, Respondent raises a "red herring" by asserting that Petitioner has no basis to challenge the constitutionality of the Jones Act under the Fifth Amendment. It is, and has always been, Petitioner's position that the Jones Act does not grant the plaintiff-seaman the power to oust a defendant of a jury trial at law. Therefore, no Fifth Amendment due process challenge was or could have been made. Respondent, however, devotes considerable space to opposing a Fifth Amendment due process challenge that was never made. This is simply a "red herring" meant to avoid meeting the issue raised, *i.e.*, that the state court's erroneous construction of the Jones Act "election" clause constitutes state action and works an unconstitutional discrimination under the Fourteenth Amendment.

Respectfully submitted,

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